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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

COUNTY OF ALLEGHENY, PETITIONER,

vs.

FRANK MASHUDA COMPANY, A PARTNERSHIP, FRANK MASHUDA, STANLEY MASHUDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1958
CERTIORARI GRANTED OCTOBER 27, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 15743 Civil Action

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners,

v.

COUNTY OF ALLEGHENY and MARTIN WISE, INC.

Appellants' Appendix

DOCKET ENTRIES.

1957		
May	3	Complaint filed.
May	3	Summons issued.
May	15	Summons returned served May 6, 1957 County of Ally; May 10, 1957 as to Martin W. Wise.
May	23	Motion to Dismiss filed by County of Allegheny.
May	23	Notice of filing Motion to dismiss, by County of Allegheny.
May	23	Interrogatories to County of Allegheny, Defendant, filed by Plaintiff.
May	24	Interrogatories as to Martin W. Wise, Inc., filed by plaintiff.
May	24	Answer of Martin W. Wise, Inc., one of the defts. filed, with acceptance of service thereon, by counsel for plff.

[fol. 2]

June	3	Motion for extension of time to answer interrogatories filed by Martin W. Wise, one of defts.

1957

June 3 Notice of filing Motion filed by deft., County of Allegheny.

June 3 Motion that interrogatories to County of Allegheny shall not be taken filed by deft., County of Allegheny.

June 11 Opposition to County of Allegheny's Motion that interrogatories shall not be taken and counterclaim to compel the County of Allegheny to answer interrogatories filed by plaintiff.

June 11 Opposition to Martin W. Wise, Inc's Motion for extension of time to answer interrogatories and countermotion to compel Martin W. Wise, Inc., to answer interrogatories filed by plff.

June 18 Acceptance of service of copy of answer of deft., Martin W. Wise, filed. by deft. County of Ally.

Sept. 4 Hearing on "All pending Motions" begun and concluded C.A.V. before Gourley, J. Hearing Memo filed.

Sept. 25 Opinion of Gourley, J. and Order granting Motion of County of Allegheny to dismiss this proceeding, filed.

Sept. 26 Pursuant to Opinion and Order entered September 25, 1957, this action is hereby dismissed.
James H. Wallace, Jr., Clerk.

[fol. 3]

Sept. 26 Notices mailed.

Sept. 27 Memorandum Order of Gourley, J. entered dismissing this action as to Martin W. Wise, Inc.,

Sept. 27 Pursuant to Order entered, this action is hereby dismissed as to Martin W. Wise, Inc.,
James H. Wallace, Jr., Clerk

Sept. 27 Notices mailed.

Oct. 18 Notice of Appeal filed as to Martin W. Wise, Inc., by plaintiff.

1957

Oct. 18 Bond for costs on appeal as to Martin W. Wise, filed.

Oct. 18 Notice of Appeal filed as to County of Allegheny, by plaintiff.

Oct. 18 Bond for costs on appeal filed as to County of Allegheny.

Oct. 18 Letters and copy of Notice of Appeals mailed to Clerk U.S. Court of Appeals and to counsel. Letter mailed to Honorable Wallace, S. Gourley, Chief Judge.

Nov. 13 Record on appeal forwarded to Clerk U. S. Court of Appeals for the Third Circuit and letters sent to counsel.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 3, 1957

FIRST COUNT

For a first count plaintiffs sue both defendants in ejectment on information and belief on a cause of action of which the following is a statement:

1. Plaintiffs are partners constituting the Frank Mashuda Company, a partnership registered to do business in Pennsylvania. Each of the plaintiffs is a citizen of the State of Wisconsin.

2. Defendant, County of Allegheny (hereinafter referred to as "the County"), is a political subdivision of the Commonwealth of Pennsylvania and is incorporated under the laws thereof as a second class County.

3. Defendant, Martin W. Wise, Inc., is a corporation incorporated under the laws of the Commonwealth of Pennsylvania.

4. The value of the land in controversy, exclusive of interest and costs, is in excess of Three Thousand Dollars ($3,000.00).

5. Plaintiff partnership is the owner in fee simple of two contiguous parcels of land aggregating eight acres and located in Moon Township, County of Allegheny, Commonwealth of Pennsylvania. Plaintiff partnership acquired an undivided one-half interest in the title to said land by two deeds in May, 1947, from the then owner of record. Plaintiff partnership acquired the remaining one-half interest in said land by deed in May, 1951, from Harrison Construction Company which had been, between 1947 and 1951, tenant in common with plaintiff partnership of the said land.

[fol. 5] 6. On June 16, 1955, the County, by a resolution of its Commissioners, purported to condemn the above land and to acquire it for the County under the latter's alleged power of eminent domain.

7. Such taking was purportedly for the purpose of establishing and maintaining air navigation and terminal facilities, the power of eminent domain for which purposes is conferred on the County by Article XXIV, Act of July 28, 1953; 16 P.S. §5402 (c).

8. Nevertheless, plaintiffs are informed and believe that the County, prior to the taking, had not formulated any definite plan for the use of the land, and had not taken any definite or substantial steps, financial or otherwise, to implement any program for the purported public use. On the contrary, plaintiffs are informed and believe that at the time of the taking the only definite plan and purpose of the County with regard to the said land was that the same would be leased to defendant Martin W. Wise Inc. for the benefit of the said lessee and for no public use. The condemnation in furtherance of the above purposes constitutes an abuse of discretion and bad faith by the County in the exercise of its power of eminent domain, and is illegal, unconstitutional, invalid and void.

9. On or about May 22, 1956, or, alternatively, on some other date unknown to plaintiffs, the County leased all or part of the premises purportedly condemned to defendant Martin W. Wise Inc. which has been, and is now, in possession thereof as lessee.

10. The land so taken has not and is not being used for the purpose of establishing and maintaining air navi-
[fol. 6] gation and terminal facilities for which public purposes alone the County has power to condemn. Nor is the said land being used for any public purpose. By the terms of the lease to Martin W. Wise Inc., the County surrendered control and possession of the land to its lessee and has allowed, does allow, and will continue to allow an improper and unlawful private use to be made of the land by the said lessee; nor has the County any definite plans for the public use thereof.

11. Plaintiffs, specifically, are informed and believe that defendant Martin W. Wise Inc., as lessee, has used and is using all or part of the purportedly condemned land as a base for its operations as a general contractor, few if any of which operations have anything whatsoever to do with the establishment or maintenance of air navigation and terminal facilities.

12. The Act relied upon to support the condemnation, which Act is referred to in Paragraph 7 of this Count, does not authorize the taking of title to and possession of land for the private purpose and use alleged.

13. If the said Act does purport to authorize a taking for the private purpose and use alleged, said Act violates both Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States; and, in any event, the taking herein alleged violates both Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States.

14. The County, having no power to condemn and use land for any purpose and use other than the public pur-
[fol. 7] poses and uses properly designated by statute, title to the land has at all times remained in plaintiff partnership.

15. The County having taken the land for the unlawful private purpose of leasing it to Martin W. Wise Inc., and having used the land for the unlawful purpose for which

it was taken, the possession of the County and of its lessee is wrongful and has damaged plaintiffs by depriving them of the use and peaceful possession of their land.

SECOND COUNT

For a second and alternative count, the plaintiffs sue both defendants on a cause of action of which the following is a statement:

16. Paragraphs 1, 2, 3 and 4 of the First Count are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

17. Plaintiff partnership, before and until June 16, 1955, was the owner in fee simple of two contiguous parcels of land aggregating eight acres and located in Moon Township, County of Allegheny, Commonwealth of Pennsylvania. Plaintiffs earlier acquired title to said land in the manner set forth in the second and third sentences of Paragraph 5 of the First Count which sentences are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

18. On June 16, 1955, the County by its Commissioners, adopted a resolution condemning the land and vesting fee simple title thereto in the County in the exercise of its [fol. 8] power of eminent domain as purportedly conferred by the Act referred to in Paragraph 7 of the First Count.

19. In pursuance of the condemnation resolution, the County petitioned the Court of Common Pleas, County of Allegheny, Commonwealth of Pennsylvania, to appoint a Board of Viewers to assess damages for the land taken. In pursuance of that petition, viewers were duly appointed. Both the County and plaintiffs have appealed from the award of damages reported by the Board of Viewers, which appeals are now pending in the Court of Common Pleas.

20. Plaintiffs are informed and believe, as set forth more fully in Paragraphs 8 through 11 of the First Count, that the County did not condemn the land for any proper public purpose or use, but for the purpose of surrendering control thereof by leasing it to defendant Martin W. Wise Inc. for a period of time, unknown to plaintiffs, and under

circumstances, similarly unknown, constituting a private use in abuse and excess of the power of eminent domain relied upon. The County thereby wrongfully acquired title to the premises and does and will continue to make such improper use to the detriment of plaintiffs.

21. Paragraphs 12 and 13 of the First Count are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

22. Plaintiffs are therefore entitled to a reconveyance of title to the land purportedly condemned, to a return of possession of the said land, and to a cancellation of the [fol. 9] lease thereof from defendant County of Allegheny to defendant Martin W. Wise Inc.

23. Plaintiffs have no adequate remedy at law.

Wherefore, the plaintiffs demand judgment of ouster and damages against the two defendants. In addition, or in the alternative, plaintiffs demand an injunction restraining the County of Allegheny from proceeding further against plaintiffs in the Court of Common Pleas in regard to the said land, a reconveyance of the land to which the County has wrongfully acquired title, a cancellation of the lease to Martin W. Wise Inc., the ouster of defendant Martin W. Wise Inc. from said land, and such additional relief as may be found to be proper.

/s/ Harold R. Schmidt, /s/ Rose, Rose and Houston, Attorneys for Plaintiffs, 717 Oliver Building, Pittsburgh 22, Pa.

[fol. 10]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 23, 1957

And Now, this 23rd day of May, 1957, comes County of Allegheny, one of the defendants above named, and respectfully moves your Honorable Court to dismiss plaintiffs' Complaint for the following reasons:

First: These proceedings involve the exercise by County of Allegheny, a political subdivision of the Commonwealth

of Pennsylvania, of the power of eminent domain under a state statute which provides a statutory remedy for the property owner involved, and such remedy is presently being pursued by the plaintiffs above named in proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1001 July Term, 1956, and no attack has been made in plaintiffs' complaint upon the constitutionality of the state statute involved or the manner in which the remedy under such state statute is being pursued, and, therefore, your Honorable Court has no jurisdiction in this case.

Second: Inasmuch as the Court of Common Pleas of Allegheny County, Pennsylvania, by the appointment of viewers at No. 2913 October Term, 1955, has exercised jurisdiction over the parties and the subject matter set forth in plaintiffs' Complaint, your Honorable Court, even assuming it has concurrent jurisdiction over the parties and the subject matter, may not and should not exercise its jurisdiction over the same res to defeat the jurisdiction of the said Court of Common Pleas of Allegheny County, Pennsylvania. The location of the res involved in these proceedings and in the proceedings before the said Court of Common Pleas, is delineated on plan attached hereto, made part hereof and marked Exhibit "A".

[fol. 11] *Third*: Inasmuch as there is pending before the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1001 July Term, 1956, by the plaintiffs who are also the plaintiffs in the above entitled proceedings, an appeal from an award of the Board of Viewers appointed by the said Court of Common Pleas, a copy of which appeal is attached hereto, made part hereof and marked Exhibit "B", and which appeal claims damages predicated on the validity of the condemnation of the property of the plaintiffs, under principles of comity plaintiffs should not be permitted to attack such proceedings in this Court.

Fourth: Plaintiffs have failed to state a claim upon which relief can be granted.

Nathaniel K. Beck, County Solicitor, Maurice Louik, Francis A. Barry, Philip Baskin, Assistant County Solicitors, Attorneys for County of Allegheny.

[fol. 12]

EXHIBIT "A" TO MOTION TO DISMISS

(P.9) EXHIBIT "A" TO MOTION TO

PROFILE OF
EAST-WEST RUNWAY (EAST APPROACH)

Glide Angle Slope 50:1 (2.00%)

Center Line Profile of Runway

-0.50%

El. 1080

El. 1100

El. 1000

El. 1134.56

El. 1133.56

200'

500'

0.00'
27.46'

25 20 15 10 5 0 30

(P.9) EXHIBIT "A" TO MOTION TO DISMISS.

PROFILE OF
EAST-WEST RUNWAY (WEST APPROACH)

Glide Angle Slope 50:1 (2.00%)

+1.50%

El. 1167.87

El. 1167.87

200'

58.37'
0.00'

El. 1200

El. 1150

El. 1100

El. 1050

El. 1000

45 0 5 10 15 20 25 30

LEGEND

PRESENT PAVEMENT AREAS AND BUILDINGS

PROJECT No. 9-36-029-5708 and 5709

PRESENT PROPERTY LINE

FUTURE PROPERTY LINE

CLEAR & APPROACH ZONE

WIND ROSE OF 1956
AT GREATER PITTSBURGH AIRPORT

96° 30' E. OF E. W. RUNWAY

CIVIL AERONAUTICS ADMINISTRATION

APPROVED DATE ____ CHIEF AIRPORTS DIVISION

APPROVED DATE ____ DISTRICT AIRPORT ENGINEER

PENNSYLVANIA AERONAUTICS COMMISSION

CHAIRMAN

DIRECTOR

ENGINEER

COUNTY DEPARTMENT OF AVIATION

APPROVED 11/6/57 Edward G. Mumma ASST. DIRECTOR-CHIEF ENG.

APPROVED 11/7/57 J. B. Sweeney DIRECTOR

NOTE:- ALL DISTANCES AND BEARINGS SHOWN HEREON ARE FROM DEED DATA AND THE BEARINGS ARE IN VARIOUS MERIDIANS.

Area 150'x75' under permit to Martin W. Wise, Inc.

EXHIBIT "A"

EXHIBIT "A"

MASTER PLAN
GREATER PITTSBURGH AIRPORT

SITUATE IN
MOON AND FINDLAY TOWNSHIPS
COUNTY OF ALLEGHENY, PA.

SCALE - 1"=400' MARCH, 1957

GRAPHIC SCALE
400 0 400 800 1600

COUNTY COMMISSIONERS
JOHN J. KANE, Chairman
HOWARD B. STEWART — JOHN M. WALKER
COUNTY CONTROLLER - - - - JAMES W. KNOX
DEPT. OF AVIATION — JOHN B. SWEENEY, Director

TYPE OF AIRPORT — INTERCONTINENTAL
HIGHEST ELEVATION — 1167.87 FT.

[fol. 15]

EXHIBIT "B" TO MOTION TO DISMISS

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

FRANK MASHUDA COMPANY, a partnership, Plaintiff,

v.

COUNTY OF ALLEGHENY, Defendant.

No. 1001 July Term, 1956

PETITION FOR APPEAL FROM AWARD OF THE BOARD OF VIEWERS

To the Honorable, the Judges of Said Court:

Your petitioner, FRANK MASHUDA COMPANY, a partnership, respectfully represents:

1. That by Resolution duly adopted by the Board of County Commissioners of County of Allegheny on June 16, 1955, and in conformance with the provisions of Article XXIV of the Second Class County Code, it was resolved that the County of Allegheny acquire by condemnation certain lands owned by the Frank Mashuda Company situate in Moon Township, Allegheny County, Pennsylvania, for the purpose of establishing and maintaining thereon air navigation and terminal facilities, and in connection therewith to take private property and acquire title thereto in fee simple.

2. Said property owned by the Frank Mashuda Company is hereby particularly described as follows:

ALL those certain two tracts or pieces of land contiguous and adjacent to each other, situate in Moon [fol. 16] Township, County of Allegheny, and State of Pennsylvania, bounded and described as follows, to wit:

PARCEL 1: BEGINNING at a point on the Westerly side of a Public Highway, Sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road, said point being on the North line of land conveyed by Albert Springer and wife to Ernest N. Chambordon, same line recorded in Deed Book No. 5870, Volume 2674, page 559, dated February 14, 1941, as "South Seventy-eight degrees six minutes West (S. 78° 06′ W.)"; thence along said line of land formerly of Ernst N. Chambordon, et ux., now owned by Ralph E. Chambordon, et ux., South Seventy-eight degrees six minutes West (S. 78° 06′ W.) for a distance Six hundred twenty-five and eight-tenths (625.8) feet to a point; thence along other land of Frank Mashuda Company North Four degrees Eleven mintes East (N. 4° 11′ E.) for a distance of Three hundred fifty-eight and six-tenths (358.6) feet to a point; thence by same land South Eighty-five degrees Forty-nine minutes East (S. 85° 49′ E.) for a distance of Two hundred seventy-two and eight-tenths (272.8) feet to a point; thence by a line extending North Four degrees Eleven minutes East (N. 4° 11′ E.) partly along other land of Frank Mashuda Company and partly along the easterly line of land of Harry W. and Mary Jane Bell, for a total distance of Three hundred sixty-nine and four-tenths (369.4) feet to a point on the Southerly side of a township road; thence along the southerly side of said township road, parallel to and sixteen and five-[fol. 17] tenths (16.5) feet off center line, South Seventy-three degrees one minute thirty-seven seconds East (S. 73° 01′ 37″ E.) for a distance of Three hundred seven and three-tenths (307.3) feet to a point on the aforesaid westerly side of a public highway sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road; thence southwardly along the westerly side of said public highway, parallel to and thirty (30) feet off center line, for a distance of Four hundred and ninety-five (495) feet, more or less to the place of beginning.

CONTAINING six (6) acres.

HAVING thereon erected a sheet metal building.

PARCEL 2: BEGINNING at a point Six hundred fifty-five and eight-tenths (655.8) feet southwestwardly from the center of a public highway sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road, said point being on the north line of land conveyed by Albert Springer and wife to Ernest N. Chambordon, same line recorded in Deed Book No. 5870, Volume 2674, page 559, dated February 14, 1941, as "South Seventy-eight degrees six minutes West (S. 78° 06′ W.)"; thence along said line of land formerly of Ernest N. Chambordon, et ux., now owned by Ralph E. Chambordon, et ux., South Seventy-eight degrees six minutes West (S. 78° 06′ W.) for a distance of Two hundred sixty-six and two-tenths (266.2) feet to a point on the line of land of West Realty Company's "Airport Estates" Plan of Lots; thence along said line North Twenty-two de-
[fol. 18] grees two minutes twenty-seven seconds East (N. 22° 02′ 27″ E.) for a distance of Two hundred sixty-eight and seven-tenths (268.7) feet to a point; thence by the same land North Four degrees eleven minutes East (N. 4° 11′ E.) for a distance of Two hundred one and four-tenths (201.4) feet to a point; thence by a line extending South Eighty-five degrees forty-nine minutes East (S. 85° 49′ E.) partly along land of West Realty Company and partly along the southerly line of land of Harry W. and Mary Jane Bell for a total distance of Four hundred forty-six and two-tenths (446.2) feet to a point at the southeasterly corner of land of said Harry W. Bell, et ux., thence along other land of Frank Mashuda Company South Four degrees eleven minutes West (S. 4° 11′ W.) for a distance of Twenty-four and seven-tenths (24.7) feet to a point; thence by same land North Eighty-five degrees forty-nine minutes West (N. 85° 49′ W.) for a distance of Two hundred seventy-two and eight-tenths (272.8) feet to a point; thence by same land South Four degrees eleven minutes West (S. 4° 11′ W.) for a distance of Three hundred fifty-eight and six-tenths (358.6) feet to the place of beginning.

CONTAINING two (2) acres.

3. On September 22, 1955 at No. 2911 October Term, 1955, the County of Allegheny petitioned and obtained the appointment of viewers by Your Honorable Court to ascertain and award just compensation for any taking, injury or destruction occasioned to the property of plaintiff by the aforesaid condemnation.

[fol. 19] 4. The said viewers in a report filed and confirmed nisi on March 29, 1956 found Frank Mashuda Company to be the owner of property above described situate in the Township of Moon, as more particularly described in plan or survey attached as part of the viewers' report, and determined the damages to said property to be $52,644.00, including compensation for delay in payment up to the date of the report.

5. The award of the Board of Viewers to Frank Mashuda Company, as set forth in paragraph "4" hereof, is unjust and unreasonable in that the damages awarded are far less than the actual value of the property taken and condemned.

6. Your petitioner avers, therefore, that an injustice has been done to it by the said Board of Viewers, and the said Frank Mashuda Company hereby appeals from the report of the said Board, and demands a trial by jury according to the course of the common law.

And your petitioner will ever pray, etc.

Frank Mashuda Company

By s/ Frank Mashuda
A partner

Counsel for Petitioner

Rose, Rose and Houston

By s/ John L. Laubach, Jr.
s/ Harold R. Schmidt

[fol. 20] *Duly sworn to by Frank Mashuda, jurat omitted in printing.*

[fol. 21]

IN UNITED STATES DISTRICT COURT

ANSWER TO PLAINTIFFS' COMPLAINT ON BEHALF OF DEFENDANT, MARTIN W. WISE, INC.—Filed May 24, 1957

Martin W. Wise, Inc., one of the Defendants in the above entitled matter, through its Attorneys, Carl Brandt and Brandt, Riester, Brandt & Malone, makes the following Answer to Plaintiffs' Complaint heretofore filed:

FIRST COUNT

First

That the Defendant, Martin W. Wise, Inc., has caused an investigation to be made of the facts set forth in the first paragraph of Plaintiffs' Complaint and has been unable to determine the truth or falsity of the same, such information being wholly within the knowledge of the Plaintiffs and, if material, proof thereof is demanded at the trial of this cause.

Second

That the allegations contained in Paragraph 2 of Plaintiffs' Complaint are admitted.

Third

That the allegations contained in Paragraph 3 of Plaintiffs' Complaint are admitted.

Fourth

That the allegations contained in Paragraph 4 of Plaintiffs' Complaint are admitted.

Fifth

That the allegations contained in Paragraph 5 of Plaintiffs' Complaint are not within the knowledge of the Defendant, Martin W. Wise, Inc. and, if material, proof thereof is demanded at the trial of this cause.

[fol. 22] *Sixth*

That the allegations contained in Paragraph 6 of Plaintiffs' Complaint are admitted.

Seventh

That the allegations contained in Paragraph 7 of Plaintiffs' Complaint are admitted.

Eighth

That the allegations contained in Paragraph 8 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the allegations contained in the first sentence thereof are wholly beyond the knowledge of the Defendant and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the second sentence thereof, the Defendant, Martin W. Wise, Inc., is without any knowledge with regard to the advice and belief of the Plaintiffs. Hoewever, (sic) if the Plaintiffs were so advised, then the Defendant, Martin W. Wise, Inc., specifically denies such allegations and, to the contrary, avers that at the time of the taking, said Defendant had no relationship whatsoever with the County of Allegheny, the other Defendant herein, either as lessee, permittee, bailee, party of a contract or any other relationship with respect to the use of the said lands and had no intention at that time to enter into any such relationship.

With respect to the allegations contained in the third sentence thereof, the Defendant, Martin W. Wise, Inc., is advised, believes and therefore avers that the same is a conclusion of law and need not be answered.

[fol. 23] *Ninth*

That the allegations contained in Paragraph 9 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that on May 22, 1956, the Board of County Commissioners duly enacted a Resolution authorizing a Permit to be issued to the Defendant, Martin W. Wise, Inc., to occupy a portion of the land so condemned under the terms and conditions set forth therein,

a true and correct copy of which is attached hereto, the provisions of which are made a part hereof by reference thereto, and marked Exhibit "A".

Tenth

That the allegations contained in Paragraph 10 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the allegations contained in the first sentence thereof are not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the second sentence thereof, such information is not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the third sentence thereof, the same are specifically denied. To the contrary, it is averred that the County of Allegheny, pursuant to the said Permit hereinbefore referred to, has granted Martin W. Wise, Inc., permission, to use certain described land "in connection with contracts of Permittee for construction of concrete pavement at Airport".

[fol. 24]

Eleventh

That the allegations contained in Paragraph 11 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the Defendant, Martin W. Wise, Inc. has used and is using the property granted under the Permit for the storage of construction materials and equipment and a batching bin only in connection with Contract No. 88G1, dated May 22, 1956, and Contract No. 8F1, dated June 19, 1956, entered into with the County of Allegheny for the purpose of establishing and maintaining air navigation and terminal facilities at the Greater Pittsburgh Airport.

Twelfth

That the allegations contained in Paragraph 12 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Thirteenth

That the allegations contained in Paragraph 13 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Fourteenth

That the allegations contained in Paragraph 14 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Fifteenth

That the allegations contained in Paragraph 15 of Plaintiffs' Complaint are conclusions of law and need not be answered.

[fol. 25] SECOND COUNT

Sixteenth

That by way of answer to the allegations contained in Paragraph 16 of Plaintiffs' Complaint, the Defendant, Martin W. Wise, Inc., incorporates its answers to Paragraphs Nos. 1, 2, 3 and 4 of said Complaint by reference hereto, with the same force and effect as though they were here set forth in their entirety.

Seventeenth

That the allegations contained in Paragraph 17 of Plaintiffs' Complaint are not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

Eighteenth

That the allegations contained in Paragraph 18 of Plaintiffs' Complaint are admitted.

Nineteenth

That the allegations contained in Paragraph 19 of Plaintiffs' Complaint are admitted.

Twentieth

That the allegations contained in Paragraph 20 of Plaintiffs' Complaint are denied as stated.

With respect to the allegations contained in the first sentence thereof, the Defendant, Martin W. Wise, Inc., is without any knowledge with regard to the advice and belief of the Plaintiffs. However, if the Plaintiffs were so advised, then the Defendant, Martin W. Wise, Inc., specifically denies such allegations and, to the contrary, avers that at the time of the taking, said Defendant had no relationship what-
[fol. 26] soever with the County of Allegheny, the other Defendant herein, either as lessee, permittee, bailee, party of a contract or any other relationship with respect to the use of the said lands and had no intention at the time to enter into any such relationship.

With respect to the allegations contained in the second sentence, the Defendant, Martin W. Wise, Inc., is advised, believes and therefore avers that the same is a conclusion of law and need not be answered.

Twenty-first

That the allegations contained in Paragraph 21 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Twenty-second

That the allegations contained in Paragraph 22 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Twenty-third

That the allegations contained in Paragraph 23 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Wherefore, the Defendant, Martin W. Wise, Inc., demands judgment in its favor.

Brandt, Riester, Brandt & Malone, By .....,
Carl Brandt, Attorney for Defendant, Martin W. Wise, Inc.

[fol. 27]

EXHIBIT "A" TO ANSWER TO PLAINTIFFS' COMPLAINT

COUNTY OF ALLEGHENY
Pittsburgh 19, Pennsylvania

GREATER PITTSBURGH AIRPORT

PERMIT

The COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, hereinafter called "County", hereby grants to MARTIN W. WISE, INC., a corporation organized under the laws of the State of Pennsylvania, hereinafter called "Permittee", the hereinafter described privileges at the Greater Pittsburgh Airport, hereinafter referred to as "Airport", located in Moon and Findlay Townships, Allegheny County, Pennsylvania, in accordance with the terms and conditions herein set forth, and the said Permittee agrees to pay the charges herein specified and to perform all other obligations imposed upon it under said terms and conditions.

1. County hereby grants to Permittee permission to use at Airport an area 75′ x 150′, containing 11,250 square feet, for the storage of construction materials and equipment and the erection of a batching bin in connection with contracts of Permittee for construction of concrete pavement at Airport. Said area is shown and designated by metes and bounds in the plan attached hereto and marked "Exhibit A2".

2. This Permit is effective as of the first day of June, 1956, and continuing for a period of twelve (12) months thereafter unless sooner revoked as herein provided.

3. Permittee shall pay to County for the permission herein granted the annual sum of THIRTEEN HUNDRED FIFTY ($1350.00) DOLLARS in installments of ONE HUNDRED TWELVE [fol. 28] and 50/100 ($112.50). DOLLARS, payable monthly in advance. All payments hereunder shall be made at the office of the Director of the Department of Aviation, Room 134-M Terminal Building, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania. All checks, drafts, or United

States money orders shall be drawn to the order of County of Allegheny.

4. Throughout the term of this Permit, Permittee shall maintain public liability insurance in the amount of Fifty Thousand ($50,000.00) Dollars for each person, One Hundred Thousand ($100,000.00) Dollars for each accident, and Fifty Thousand ($50,000.00) Dollars for damage to property for each accident. Permittee shall maintain Workmen's Compensation insurance covering all persons employed by Permittee therein. Certificates evidencing the maintenance of all of such types of insurance shall be furnished to County within ten (10) days after the execution of this Permit, and said certificates shall evidence all of said types of insurance to be noncancellable by the insuring company or companies except upon thirty (30) days' notice to County.

5. Permittee agrees to indemnify and hold harmless County from all claims and damands of whatever nature of third persons for personal injuries, including death, or property damages as well as liability for taxes or assessments of any kind which by law may or can be levied upon County arising out of the operation of Permittee herein, or for any wrongful act or omission on the part of Permittee, or agents, servants, employees and invitees of Permittee.

6. Permittee agrees to use the premises only for the express purpose or purposes hereinbefore stated. County has applied for and received a grant or grants of money [fol. 29] from the Administrator of Civil Aeronautics pursuant to the Federal Airport Act of 1946, as amended and supplemented, and County may in the future apply for and receive further such grants, and in connection therewith County has undertaken and may in the future undertake certain obligations respecting its operation of the Airport and the activities of its Permittees and Concessionaires thereon; and Permittee, therefore, covenants and agrees that if the Administrator of Civil Aeronautics or any other governmental officer or body having jurisdiction over the enforcement of the obligations of County in connection with Federal Airport Aid shall make any orders, recommendations or suggestions respecting the performance by Per-

mittee of its obligations under this Permit, Permittee shall promptly comply therewith at the time or times when and to the extent that the Director may direct.

7. No signs, posters or similar devices shall be erected, displayed or maintained in or about the space herein granted without written approval of the Director, and any not approved by him may be removed by the said Director at the expense of Permittee and without liability of any kind whatsoever to County.

8. Permittee and its employees shall have no right to park vehicles within the Airport beyond a reasonable loading or discharging time, except in regular parking areas and upon payment of the regular charges therefor.

9. The operations of Permittee, the employees and invitees and those doing business with Permittee shall be conducted in an orderly and proper manner and so as not to annoy or disturb or be offensive to others at the Airport. County shall have the right to object to Permittee as to [fol. 30] the demeanor, conduct and appearance of Permittee's employees, invitees and those doing business with Permittee, whereupon Permittee will take all steps necessary to remove the cause of the objection.

10. County shall have the right to terminate and revoke the permission hereby granted in its entirety or in part at the option of County immediately upon the happening of any of the following events:

1. Filing by Permittee of a voluntary petition in bankruptcy.
2. The making by Permittee of any general assignments for the benefit of creditors.
3. The occurrence of any act which operates to deprive Permittee of the rights, powers and privileges necessary for the proper conduct and operation of the business described in this Permit.
4. The abandonment or discontinuance of the operation of the business described in this Permit.

5. The failure by Permittee to perform, keep and observe any of the terms, covenants and conditions hereunder contained on the part of Permittee to be performed, kept or observed.

6. Notwithstanding any other rights which County may have to cancel and revoke this Permit, the Board of County Commissioners may cancel and revoke this Permit at any time that it resolves that the continuance of the permission herein granted to Permittee would be contrary and detrimental to the interest of County or the public interest and welfare.

[fol. 31] The cancellation or revocation of this Permit shall not relieve Permittee of any liabilities or obligations hereunder which shall have accrued prior to the effective date of cancellation or revocation.

11. This Permit and the space herein granted shall not be assigned, tranferred, sublet or otherwise disposed of without the written approval of County, nor shall such permission be subject to devise or inheritance upon the death of Permittee without the written consent of County.

12. No officer or employee in any department of County shall have any permit, concession or privilege, or any interest or connection, directly or indirectly with any permit, concession or privilege pertaining to the Greater Pittsburgh Airport.

13. It is understood and agreed that nothing herein contained is intended or shall be construed to in any wise create or establish the relationship of co-partners between the parties hereto, or as constituting Permittee the general representative or agent of County for any purpose whatsoever.

14. In addition to the express terms and conditions hereof, Permittee shall be bound by all the laws, ordinances, rules, regulations, directives, memoranda and requirements of the United States Government, Commonwealth of Pennsylvania and County of Allegheny, and their respective

agencies, issued for the operation and conduct of the Airport, all of which are hereby made an integral part of this Permit. Permittee shall comply, at its own cost and expense, with all Federal, State and local laws, ordinances, rules or regulations now or hereinafter in force govern-
[fol. 32] ing the operation of its business at the Airport. Permittee shall obtain and pay for all licenses and permits necessary for the operation of its business under this Permit, and shall pay all fees and charges assessed under Federal, State or local statutes or ordinances insofar as they are applicable thereto. Permittee shall protect, indemnify and save harmless the County, its authorized agents or representatives from and against any damage, penalty, fine, judgment, expense or charge which may be suffered, imposed, assessed or incurred by reason of the violation, disregard or breach of any law, ordinance, order or regulation, or by reason of any act, neglect or omission of Permittee, or by any agent or employee of Permittee.

15. County shall not be liable to Permittee or its employees for any damages to any property at any time in said space or at the Airport resulting from any casualty or accident in or about said Airport howsoever occurring, or for damage done to Permittee's property by any other permittee, concessionaire or visitor at the Airport in any manner whatsoever.

16. County shall not be responsible to Permittee for any non-observance of rules and regulations on the part of any other permittee or concessionaire.

17. Definition of the terms as used herein:

(a) The term "Director" shall mean the person from time to time designated by the Board of County Commissioners of Allegheny County as the Director of the Department of Aviation of Allegheny County.

[fol. 33] (b) Whenever in this Permit, including all endorsements and exhibits thereto, the pronoun "it" or the adjective "its" may occur referring to Permittee, the said pronoun or adjective shall be deemed and taken to mean "it", "he", "him", "she", "her", "they", "them", or "its", "his", "her", "hers", "their" or "theirs", as the circumstances of the reference may require.

18. Notice as herein provided shall be sufficiently rendered or given if the same be in writing and sent by registered mail addressed to Permittee at Locust Place and Centennial Avenue, Sewickley, Pennsylvania, or at the latest address that Permittee may substitute therefor by notice in writing to County, or left at such address, or delivered to Permittee's representative, and the time of such note shall be deemed to be the time when the same is mailed, left or delivered as herein provided. Any notice from Permittee to County shall be validly given if sent by registered mail to the Director, Department of Aviation, Room 134-M, Terminal Building, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania.

[fol. 34] IN WITNESS WHEREOF, this Permit has been duly executed this 9 day of April, 1957.

COUNTY OF ALLEGHENY
By .....
/s/ Howard B. Stewart
/s/ John M. Walker
County Commissioners

MARTIN W. WISE, INC.
By /s/ M. W. Wise
President

ATTEST:
/s/ M. M. Snyder [SEAL]
Chief Clerk

ATTEST:
/s/ M. V. Wise [SEAL]
Secretary

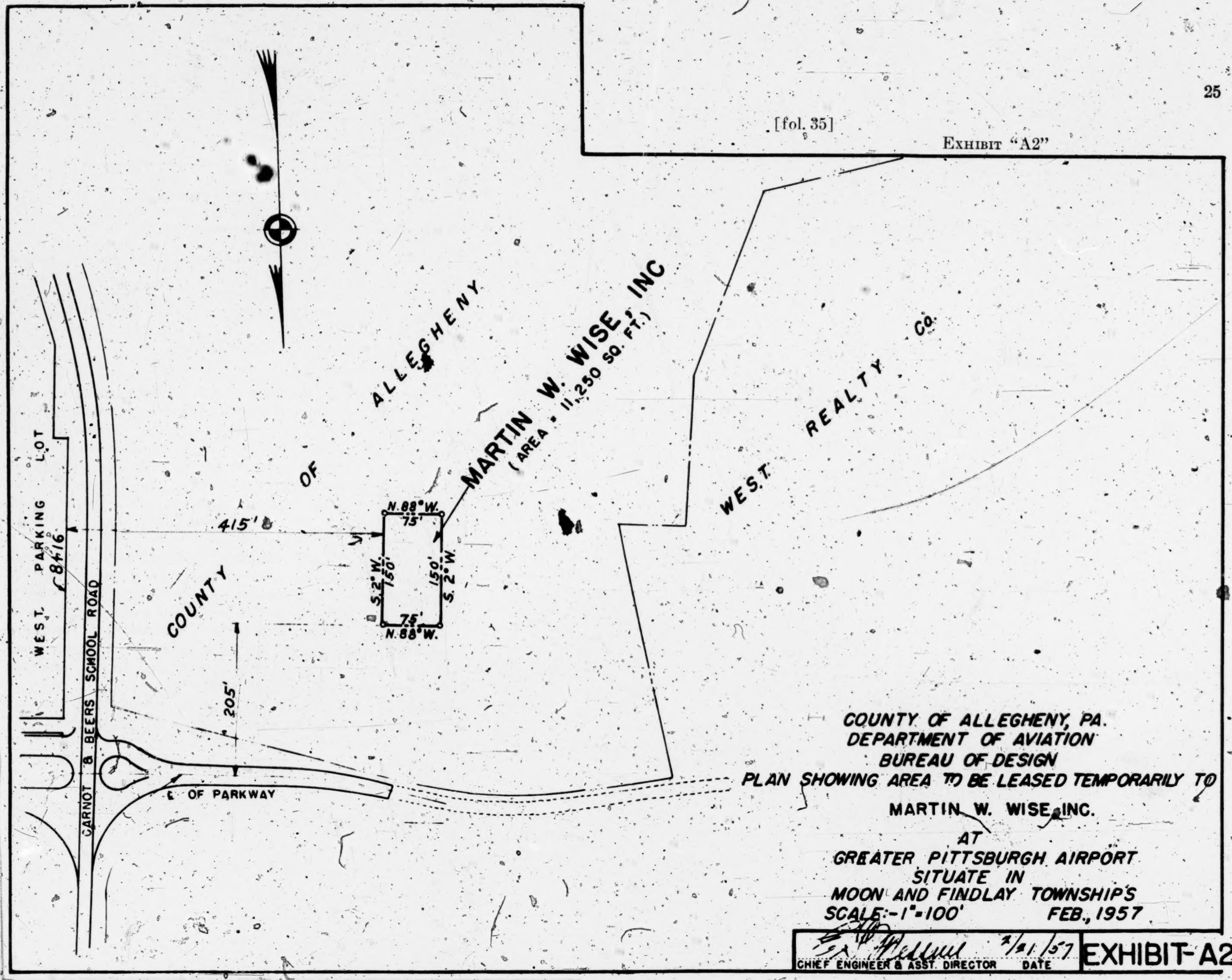
This Permit approved this 28th day of March, 1957.

/s/ E. G. Messner
Acting Director,
Dept. of Aviation

APPROVED AS TO FORM:
/s/ Nathaniel K. Beck
County Solicitor
/s/ A. L. McLaughlin III
Asst. County Solicitor

[fol. 35]

EXHIBIT "A2"



COUNTY OF ALLEGHENY, PA.
DEPARTMENT OF AVIATION
BUREAU OF DESIGN
PLAN SHOWING AREA TO BE LEASED TEMPORARILY TO
MARTIN W. WISE, INC.
AT
GREATER PITTSBURGH AIRPORT
SITUATE IN
MOON AND FINDLAY TOWNSHIPS
SCALE:-1"=100' FEB., 1957

E. W. Weddell 2/21/57
CHIEF ENGINEER & ASST. DIRECTOR DATE

EXHIBIT-A2

[fol. 37]

IN UNITED STATES DISTRICT COURT

OPINION—September 25, 1957

WALLACE S. GOURLEY, Chief Judge:

This matter comes before the court on motion of the political subdivision of Allegheny County, Pennsylvania, to dismiss a complaint challenging the validity and constitutionality of a condemnation proceeding relative to property situate in Allegheny County, Pennsylvania, but owned by residents of the State of Wisconsin.

The issue posed may be thus stated:

Where diversity of citizenship exists between the owners of property condemned by a political subdivision in the Commonwealth of Pennsylvania, and no proceeding has been filed in the state jurisdiction to question the validity of the condemnation proceeding, does the United States District Court have legal authority to consider the validity of the condemnation proceeding and award damages, or in the alternative enjoin the political subdivision from proceeding in the state jurisdiction?

In view of plaintiffs' demand for judgment of ouster and damages, and/or for injunctive relief to be effectuated by reconveyance of the situs to which the County of Allegheny has acquired title, the relief demanded necessarily entails the use of the equity powers of this court. The Supreme Court of Pennsylvania has enunciated the doctrine that the remedy of a person who is damaged by the exercise of a governmental authority of the power of eminent domain is an action to assess damages for such taking; an action in equity to enjoin the taking cannot be maintained and cannot be prosecuted in the equity branch of the court. Lowen, Appellant, v. Shapiro, 389 Pa. 610; Creasy, Appellant v. Lawler, 389 Pa. 635.

[fol. 38] In addition, it is significant to note that, upon a most exhaustive review of the authorities, neither counsel nor the court has found legal precedent in the United States District Court for the granting of injunctive relief where the matter involved was pending in state court pro-

ceedings. The authorities to the contrary have held that where condemnation proceedings are pending in a state court, the United States District Court will refuse to enjoin such proceedings. Baber v. Texas Utilities Co., 228 F. 2d 665 (5 Cir.); Collins v. Laclede Gas Co., 237 F. 2d 633 (8 Cir.).

I am satisfied that although diversity of citizenship exists between the parties, grounding jurisdiction in this court, nevertheless the United States District Court should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding. I cannot but help so conclude, especially where in the instant proceeding no action has been taken in the state jurisdiction to question the validity of the state condemnation proceeding. I must give emphasis to the disinclination of federal authority to interfere in state matters until state remedies have been exhausted.

An appropriate Order is entered.

ORDER DISMISSING COMPLAINT—September 25, 1957

And Now, this 25 day of September, 1957, the motion of the County of Allegheny to dismiss the within proceeding is granted.

/s/ Wallace S. Gourley, CDJ, Chief Judge.

[fol. 39]

MEMORANDUM ORDER RE DISMISSAL OF MARTIN W. WISE, INC.—September 27, 1957

In this action the court entered an order on the 25th day of September, 1957, in which the proceeding was dismissed as to the County of Allegheny. The cause of action against Martin W. Wise, Inc., must basically rest on a sustainable cause of action against the County of Allegheny since Martin W. Wise, Inc., is in possession of the premises by virtue of a lease executed by the County of Allegheny in favor of Martin W. Wise, Inc. Although Defendant Wise has answered, denying the allegations of plaintiffs, the cause of action of plaintiffs against Wise can rise no higher

than plaintiffs' cause of action against the County of Allegheny.

In view of the foregoing and for the reasons set forth in the opinion filed on the 25th day of September, 1957, the proceeding against Martin W. Wise, Inc., is dismissed.

/s/ Wallace S. Gourley, Chief Judge.

[fol. 40]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

v.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 17, 1958

Before Goodrich, McLaughlin and Staley, Circuit Judges.

OPINION OF THE COURT—Filed June 10, 1958

By GOODRICH, Circuit Judge:

This is an appeal from a judgment for the defendant entered on a motion to dismiss an action by which the plaintiffs sought an adjudication of the propriety of an eminent domain proceeding. Since the judgment was rendered without a hearing on the facts, we take the plaintiffs' allegations as true for the purpose of this appeal.

[fol. 41] The plaintiffs, citizens of Wisconsin, own land adjacent to the Greater Pittsburgh Airport which is located in Allegheny County, Pennsylvania. On June 16, 1955, the

County purported to condemn plaintiffs' land for the alleged purpose of establishing and maintaining air navigation and terminal facilities at the airport.[1] Viewers were appointed to assess compensation. The viewers reported and both the County and the plaintiffs took an appeal to the Court of Common Pleas for Allegheny County.[2] In the meantime the County had leased a part of the property condemned to Martin W. Wise, Inc., a Pennsylvania corporation engaged in general contracting, for the purpose of storing its tools and heavy equipment thereon.

On May 3, 1957, the plaintiffs brought this action in the United States District Court for the Western District of Pennsylvania suing the County of Allegheny and Martin W. Wise, Inc., federal jurisdiction being based on diversity of citizenship. The basis of the complaint is that the land was not condemned for a public purpose and, therefore, the taking is invalid. The plaintiffs allege that at the time of the condemnation the County had not formulated a plan to utilize the property for the purposes stated and has not to the present initiated any substantial steps to implement a program with such a goal. Instead, it is claimed, the County's sole purpose was to permit the private use of the lots by Wise which, in any event, has been the only result of the taking so far. A judgment of ouster and damages is demanded. In the alternative, plaintiffs, in the district court, sought an order restraining the County from proceeding further, a reconveyance of the title of the land to the plaintiffs and a cancellation of the lease to Wise. The district judge, although recognizing his jurisdiction in the case, dismissed the complaint expressing a disinclination to interfere with the state condemnation procedure.

[fol. 42] The point which has most concerned us about this case is the manner of attacking, under Pennsylvania law, the propriety of a purported exercise of the power of eminent domain. All through the sections of the statute cited above there is a rather particularized method of appointing

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[1] The authority for condemnation for airport purposes is found in Pa. Stat. Ann. tit. 16, § 5402(c) (Purdon 1956).

[2] This procedure is in accordance with *id.* §§ 5601-33.

viewers, having them report, fixing the damages and so on. There is nothing in those sections which we can see which talks about anything but the fixing of the amount of damages. Inspection of the plaintiffs' petition in the Common Pleas Court of Allegheny County shows only a claim that the amount awarded by the viewers was inadequate. Indeed, the District Court for the Eastern District of Pennsylvania has said, "The right to condemn cannot be raised at the trial following condemnation. Such a trial is merely of a feigned issue, to determine solely the quantum of compensation." *Colgate v. Philadelphia Elec. Power Co.*, 20 F.2d 263, 264 (E.D. Pa. 1928). *Cf. Lehigh & New England R.R. Petition*, 7 Northhampton 77 (Pa. C.P. 1899).

The plaintiffs have cited a line of decisions in which an independent action has been maintained to test the validity of condemnation proceedings. We find the cases to be in point. *Spann v. Joint Board of School Directors*, 381 Pa. 338, 113 A.2d 281 (1955); *Colove v. Borough of Robesonia*, 364 Pa. 626, 73 A.2d 679 (1950); *Pioneer Coal Co. v. Cherrytree and D. R. R.*, 272 Pa. 43, 116 Atl. 45 (1922); *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487 (1913); *Vinton Colliery Co. v. Blacklick & Y.C.R.R.*, 226 Pa. 131, 75 Atl. 185 (1910); *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944); *C. P. Struse & Sons, Inc. v. Reading Co.*, 12 Pa. D. & C. 465 (Phila. Co. C. P. 1929); *Youghiogeny River Coal Co. v. Robertson*, 1 Pa. Dist. 809 (Alleg. Co. C. P. 1892). A statutory foundation for the procedure followed in these cases may be found in PA. STAT. ANN. tit. 12 § 1315 (Purdon 1953).

These authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that [fol. 43] in which compensation is awarded. We think an equal jurisdiction lies in the federal district court assuming that the required diversity exists as it does here. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905). We do not find merit in any of the arguments presented by the County for not accepting that jurisdiction.

In the first place there is no conflict here with 28 U.S.C. § 2283. That section has to do with "injunctions to stay

proceedings in a State court." However, plaintiffs do not press before us their alternative theory of relief in the nature of a restraining order. They do stress their remedies at law, especially ejectment, which do not have the same preventive effect on the state court proceedings.

Moreover, since the question involved before the federal court need not, and perhaps cannot, be raised in the pending state action, the exercise of diversity jurisdiction here will not directly interfere with the Common Pleas Court's handling of its case. True, if the plaintiffs are successful in attacking the validity of the purported condemnation, there will no longer be a need for an adjudication of damages, because there will be no damages. But that is nothing more than would occur as a result of taking the same steps in a state court. Furthermore, we see no inconsistency in the plaintiffs complaining about the amount of damages awarded by the viewers in the Common Pleas court in Pittsburgh and at the same time attacking, in a separate federal proceeding, the legality of what the County has done.

The fact that the plaintiffs waited two and a half years after the resolution of condemnation before attacking its legality does not, of itself, bar them from relief because of laches. It seems to us to make the case stronger because they waited a time to see what use the County was either making or planning to make of the land.

Our conclusion is that the federal court has jurisdiction to entertain the suit brought in this case and the plaintiffs are entitled to a trial on their allegations of fact.

[fol. 44] The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

[fol. 45]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,434

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

vs.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

JUDGMENT—June 10, 1958

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest: Ida O. Creskoff, Clerk.

[fol. 46]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,435

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

vs.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

JUDGMENT—June 10, 1958

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest: Ida O. Creskoff, Clerk.

[fol. 47] [File endorsement omitted]

[fol. 48]

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed June 23, 1958

To the Honorable, the Judges of Said Court:

County of Allegheny, Appellee in the above appeals, respectfully petitions your Honorable Court to grant a

rehearing, before the court in banc, for the following reasons:

1. (a) Only a week prior to filing of your Honorable Court's opinion (Appendix A hereof), and therefore too late to be considered by this Court, the Pennsylvania Supreme Court declared the Pennsylvania law on the principal question involved in these appeals to be directly contrary to the conclusion of your Honorable Court as to the Pennsylvania law.

(b) As your Honorable Court stated in its opinion: "the point which has most concerned (the Court) about this case is the manner of attacking, under Pennsylvania law, the propriety of a power of eminent domain." (Appendix A, page 11). Your Honorable Court then determined that the Board of Viewers could only assess damages and that since a separate proceeding was required to attack the legality of the taking, a question of law as well as fact, a suit based upon diversity of citizenship could be brought upon this question in a Federal court as well as in a separate proceeding in the State court. (Appendix A, pages 11-12).

(c) In an unanimous opinion, filed June 3, 1958 in the case of *Gardner, et al.*, v. *County of Allegheny, et al.*, Nos. 72, 73, 74, 75, 76 March Term, 1958, (Appendix B hereof) the Pennsylvania Supreme Court decided that in an eminent domain proceeding involving the County of Allegheny, the Board of Viewers, originally, (and the Court [fol. 49] of Common Pleas, on appeal from the determination of the Board of Viewers), "must decide *all relevant questions of law* or fact before it can competently make an award of damages or assessment of benefits." (Emphasis supplied), Appendix B, page 24).

2. If the decision and opinion of your Honorable Court is permitted to stand it will have the following serious effects:

(a.) It will be directly contrary to the decision of the highest appellate court of Pennsylvania on a question of the interpretation of a State law which is of vital public importance. For the question of the jurisdiction, powers and duties of the Board of Viewers under the Second Class

County Code is wholly a question of State law and the Federal courts must recognize State law as declared by the State courts.

(b.) It may seriously confuse the statutory procedures for eminent domain which have been followed in Pennsylvania for many years, particularly at a time when the County is embarking upon a large redevelopment program which will involve the exercise of the power of eminent domain to a great extent.

(c.) (i) It will interfere with proceedings in a State court, which has jurisdiction *over the parties* hereto, and which has jurisdiction *over the subject matter,* to-wit, whether there was a proper taking. As counsel for the appellants admitted to this Court in his argument, there is no Federal constitutional question involved—what is involved is simply whether Allegheny County properly took property under a constitutional State statute. The appel- [fol. 50] lants admitted in proceedings before the Board of Viewers that the County properly took the property. Now they claim after-discovered evidence of an improper taking. Since the proceedings in the State court are still open and since the State court has jurisdiction to determine the question of the taking, the decision of your Honorable Court, if permitted to stand, would be a clear instance of staying a State court from exercise of its jurisdiction in pending proceedings simply because of diversity of citizenship.

(ii) Even if we assume the appellants could, by reason of diversity of citizenship, have brought an action in a Federal court, to test the legality of the taking by Allegheny County, they cannot ask the Federal court to determine that issue after first subjecting themselves to the jurisdiction of the Board of Viewers and of the Court of Common Pleas which has the power and jurisdiction to determine that question. It is as though a plaintiff with a choice to sue in either a State or Federal court had sued in a State court and then subsequently brought a suit in a Federal court on one of the issues within the jurisdiction of the State court.

(iii) Furthermore, the decision of this Court would raise a very grave issue of *res judicata*. The Pennsylvania Supreme Court has stated that the Board of Viewers and the Court of Common Pleas, on appeal from a decision of that Board, has jurisdiction to determine *all questions of law* as well as of fact involved in a taking. In the proceedings now before the Board of Viewers the appellants here have admitted a proper taking. Since the State court has jurisdiction over that matter, unless that court determines, on petition of appellants in that proceeding, [fol. 51] that there has not been a proper taking, the appellants will be bound. The question then arises whether in a subsequent suit filed in another court, the appellants can re-try an issue which was presented to and determined in another court which has jurisdiction over that issue.

(iv) The cases cited by this Court in its opinion, when it did not have the benefit of the decision of the Pennsylvania Supreme Court in the *Gardner* case, are therefore inapplicable. Furthermore, it should be pointed out that all of those cases involved *private corporations, not municipal corporations,* and that the statute cited by this Court, *12 PS § 1315,* does not deal with the procedure of eminent domain as its (sic) affects Allegheny County, which is governed by the Second Class County Code.

3. The situation which the Pennsylvania Supreme Court was called upon to decide in the *Gardner* case is squarely in point.

(a) In a prior appeal, *Gardner et al., v. County of Allegheny et al.,* at No. 382 Pa. 88, 114 A. 2d 491, the Pennsylvania Supreme Court had decided that the plaintiffs, in an equity suit against the County of Allegheny, could not have a question of eminent domain decided by the Equity side of the Common Pleas Court, since that court has no jurisdiction to award damages for a taking.

(b) Subsequently, the additional defendants, various airlines, filed an Answer setting forth as one of their defenses, that Allegheny County had taken the plaintiffs' property under its right of eminent domain. The County filed preliminary objections claiming that this defense must be

stricken since the Common Pleas Court in equity had no [fol. 52] jurisdiction to determine the question of a taking by the County, which question must first be presented to a Board of Viewers in accordance with statutory procedure.

(c) Before the Pennsylvania Supreme Court, the airlines and plaintiffs contended that this defense concerned only the question of a taking and not the question of damages, and that the lower court could determine the question of a taking, leaving the question of damages to a Board of Viewers in a subsequent and separate proceeding.

(d) The County's position was that all questions concerning a taking by the County, including the question of whether there was a proper taking, must first be submitted to a Board of Viewers under Pennsylvania statutory procedure. The County's position to the Supreme Court was stated as follows in its brief:

> "The Board of Viewers in an eminent domain proceeding does more than merely fix an amount of damages. The Board of Viewers must determine whether there has been a taking of property, to whom an award for damages should be made, and make an assessment of the amount of the damages. This is exclusively within the jurisdiction of the Board of Viewers, and a court, sitting in equity, has no jurisdiction in this matter".

This same argument was presented to your Honorable Court.

(e) The Pennsylvania Supreme Court stated (Appendix B, page 23):

> "We decide that the Court of Equity does not have jurisdiction under the pleadings in this case, *to deter-* [fol. 53] *mine* that there was a 'taking' of plaintiffs' properties, or, amount of damages resulting from a 'taking' . . .
>
> "The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed 'to determine and assess the damages for the land, prop-

erty or material taken, injured or destroyed . . .' See also: Article I, § 10; Article XVI, § 8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the Board of Viewers be bound by such a decision or could the Board make a determination that there was a 'taking' of a fee simple instead of an easement, or that there was no 'taking' at all? As the present Chief Justice said in *Powell Appeal*, 385 Pa. 467,* 123 A. 2d. 650 page 471-472): 'While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, *it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of* [fol. 54] *damages or assessment of benefits:* See case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191 . . . : *(The Viewers) were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject, however, to review by the sessions.'"* ** (Emphasis supplied.)

"It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the Airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the

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* Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was *no specific* authority granted to the Court of Quarter Sessions or to the Board of view *to determine* whether there had been a "taking".

** Court of Quarter Sessions. (In the instant case, review is by the Court of Common Pleas).

present defendants have been brought and completed, or have been waived under § 2632 of the Second Class County Code and finally determined in such a proceeding."

4. In view of the importance of this decision in a field so vital to municipal governments in Pennsylvania as the field of eminent domain, and in view of the direct conflict between the decision of your Honorable Court and the almost simultaneous decision of the Pennsylvania Supreme Court, County of Allegheny respectfully submits that your Honorable Court grant a rehearing in this case.

5. In view of the great public importance of the question involved to the County of Allegheny, as well as to other political subdivisions throughout Pennsylvania, it is re- [fol. 55] spectfully submitted that the rehearing be before the entire Court in banc.

Respectfully submitted,

Maurice Louik, County Solicitor, Philip Baskin, Asst. County Solicitor, Francis A. Barry, Asst. County Solicitor, Attorneys for Petitioners.

CERTIFICATE

I, Maurice Louik, of counsel for County of Allegheny, appellee above, certify that the Petition for Rehearing presented in this case is presented in good faith and not for delay.

Dated June 19, 1958.

Maurice Louik, County Solicitor.

[fol. 56]

APPENDIX A

Omitted. Printed side page 28 ante.

[fol. 61]

Appendix B

In the Supreme Court of Pennsylvania
Western District

Nos. 72, 73, 74, 75, 76—March Term, 1958

Gardner et al.

v.

County of Allegheny et al.

Appeals of the County of Allegheny, Raising a Question of Jurisdiction, from the Orders, dated January 2, 1958, of the Court of Common Pleas of Allegheny County at Nos. 1289, 1640, 1288, 1707 and 1706 respectively, October Term, 1953, five companion cases filed by different plaintiffs, but having the same defendants.

Opinion of the Court—Filed June 3, 1958

Bell, J.:

The County of Allegheny appealed from an Order of the Court of Common Pleas of Allegheny County which dismissed the preliminary objections filed by the County to certain *new matter* in the Answer of the defendant Airlines.* A complaint in equity had been filed by the respective owners of five properties which are situate adjacent to the Greater Pittsburgh Airport in Moon and Findlay Townships, Allegheny County. In the Court below, in this Court, and in all prior proceedings before this Court, the [fol. 62] five actions were consolidated for argument and trial.

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* The appeal was taken under the Act of March 5, 1925, P.L. 23, § 1, 12 PS 672.

The complaint in equity of the respective property owners sought an injunction against the County and against all of the Airline defendants to restrain allegedly dangerous and illegal flights of aircraft over their respective properties. Plaintiffs averred that these flights, which number 8 every ten to fifteen minutes, and which endangered their lives and their homes, were unlawful trespasses. The owners asked as an alternative relief, that the Court (a) find that the acts of the defendants constituted a "taking" and (b) award to each plaintiff the fair market value of his property. The defendants filed preliminary objections to each of these complaints; these objections were overruled by the Court below. Upon appeal, this Court decided in *Gardner* v. *Allegheny County et al.*, 382 Pa. 88, 114 A. 2d 491, that on the pleadings, as they then existed, the Court below (1) was correct in overruling the preliminary objections of the defendants to that part of the complaint which sought an injunction, (2) but was in error in overruling the County's objection to plaintiffs' claim for a "taking" of their respective properties, and (3) directed the lower Court to enter a modified Decree consistent with this Court's Opinion.

The Court below thereupon entered an Order on September 30, 1955, which was subsequently amended by its Order dated March 15, 1956, the effect of which was to strike from the plaintiffs' complaint all claims for damages for a "taking", leaving only a claim for injunctive relief and for damages for trespass. The lower Court wisely [fol. 63] permitted the defendants to file Answers including new matter.

The Airlines in paragraph 19a of their Answers averred the following new matter:

"19a. The County of Allegheny, one of the defendants, has constructed and maintains the Greater Pittsburgh Airport in Moon Township, Allegheny County, Pennsylvania, as a public improvement, pursuant to statutory authority to provide airport and air transport facilities for the use of the public. To enable the public to have facilities for air transport of passengers and cargo, which facilities are essential for the functioning of the airport, it is necessary

that airplanes *enter and leave** the airport by passing *through the air space above the plaintiffs' property below 500 feet.* Allegheny County has entered into a lease with each of the airline defendants granting to them for certain considerations the right to ingress and egress to and from the said airport.

"As a direct and necessary consequence of the construction and operation of the airport by the said County, the said County, *under its right of eminent domain,* has appropriated for public use, *avigation easements* for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. The airline defendants aver that their planes pass through the air space over the plaintiffs' property only to the extent necessary to enter and leave the airport and in the exercise of their right to use the avigation easements which the County has appropriated. [fol. 64] Wherefore, the airline defendants deny the right of the plaintiffs to enjoin their use of the avigation easements appropriated for public use by the County of Allegheny."

Defendants further averred that "all of the flights of aircraft in and out of the Greater Pittsburgh Airport have been in accordance with the regulations issued by the Civil Aeronautics Administration [Board] . . . and are never lower than necessary for safe landing and takeoff."

The County of Allegheny thereupon filed preliminary objections to paragraph 19a of the new matter in the Airlines' Answers on the ground that the allegations presented a question which this Court, in our prior decision, had decided was not within the jurisdiction of a Court of Equity.

This appeal, which is based upon new facts, raises new questions which were not before this Court, as well as questions which were not definitely decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. The lower Court interpreted our prior decision as prohibiting a Court of Equity from making an award of damages for a "tak-

* Italics throughout, ours.

ing", but did not prohibit the Court of Equity *from determining* that there had been a "taking", and did not prohibit a Court of Equity from awarding damages for trespasses.* The County of Allegheny, on the other hand, contends that a Court of Equity—for technical, legal and practical reasons—should not be entitled to determine the question of [fol. 65] whether there had been a "taking", and then leave to a board of viewers merely the question of assessing the damages.

Novel, intricate and difficult questions are raised by this appeal. Each party has presented technical, as well as practical, reasons why their position should be sustained. We believe it would aid a solution of these problems if we pointed out what was and what was not decided by this Court in *Gardner* v. *Allegheny County*, 382 Pa., supra. It must be recalled that this case, as well as the prior case, arose upon preliminary objections to pleadings, which of course admitted all averments of fact made in the complaints in the prior cases and in the Answer in the present case: *DeJoseph* v. *Zambelli*, 392 Pa. ....., ... A. 2d .....; *Liggins Estate*, 392 Pa. ....., ... A. 2d .....; *Eways* v. *Reading Parking Authority*, 385 Pa. 592, 124 A. 2d 92; *Gardner* v. *Allegheny County*, 382 Pa., supra.

In our prior decision in 382 Pa., this Court held, inter alia: (1) A Court of Equity has jurisdiction to enjoin repeated trespasses in the air which endanger the lives and homes of complainants, as well as trespasses on the land of a property owner, and likewise to enjoin a nuisance. (2) A Court of Equity has jurisdiction to enjoin continuing flights of aircraft over a land owner's property at heights which are below the minimum safe altitudes of flight. Whether a Court of Equity has jurisdiction to enjoin aircraft flights which are within the air space necessary for safe takeoffs or landings if such flights imminently endanger a property owner's life or property, was not decided. (3) Flights of aircraft over privately owned land

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* It is obvious that a Court of Equity could award damages for trespasses only if, and after it found that plaintiffs were entitled to equitable relief, because of the danger to the lives or properties of plaintiffs.

which are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the [fol. 66] land amount to a "taking" of the land or, depending on the facts, may amount to a trespass or a nuisance. Even though only an "easement" of flight was taken, that easement, if permanent and not merely temporary, would normally be the equivalent of a fee simple interest. (4) The Act of May 2, 1929, P.L. 1278, which was reenacted in the Second Class Code, specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding when compensation cannot be agreed upon. (5) A Court of Equity has no jurisdiction to assess damages for a "taking" of land.*

On the question of eminent domain, which was so vigorously argued in the present appeal, this Court said in 382 Pa.:

"Nevertheless, a Court of Equity has no power or jurisdiction to assess damages for a 'taking'. The condemnation of property for airdromes and landing fields is authorized by the Act of May 2, 1929, P.L. 1278, Art. V, §496, since reenacted in the Second Class County Code, 16 PS 2151-2401 et seq. Section 2151-2403 provides: 'The proceedings for the condemnation of lands under the provisions of this article [Aeronautics] and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided [by law for the condemnation of land:]'

"Art. VII, §518, of the Act of May 2, 1929, P.L. 1278, now reenacted in the Second Class County Code, 16 PS [fol. 67] 2151-2608(a), sets forth the provisions for the condemnation of land above referred to. This section provides: 'In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed by the county

* An Opinion for the Court, a Concurring Opinion, a separate Concurring Opinion, and an Opinion Concurring in part and Dissenting in part were filed in this case, which is exceptionally unusual in this Court and was probably necessitated by the somewhat indefinite statement of facts and the novel questions of law presented.

fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition .... to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, ...

"'The said viewers ... having viewed the premises ... shall hear all parties interested and their witnesses, and, ... shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, ...': Article VII, §523.

"That Act specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding, when compensation cannot be agreed upon. Nowhere in the Act is there any provision for a Court in Equity to fix and determine the value of plaintiffs' property. This Court, in Hastings Appeal, 374 Pa. 120, 97 A. 2d 11, said (page 125): 'A board of view is not common law remedy; it exists only where it has been provided for by statute: see Locust Street Subway Case, supra, [319 Pa.] at p. 165. In the situations for which it has been provided, it is the only available remedy: Power v. Borough of Ridgway, 149 Pa. 317, 318, 24 A. 307; and McKee v. City of Pittsburgh, 7 Pa. Superior Ct. 397, 400; ...'

"....

[fol. 68] "While there is a well established general principle that once equitable jurisdiction has attached, equity can round out the whole circle of controversy and thus do complete justice between the parties: See: Wortex Mills, Inc. v. Textile Workers Union of America, 380 Pa. 3, 109 A. 2d 815, and cases cited therein; nevertheless, this principle cannot be extended and gives no power or jurisdiction to a Court of equity to grant relief in matters in which a specific and adequate remedy or different jurisdiction is provided by statute: United Drug Co. v. Kovacs, 279 Pa. 132, 123 A. 654; Century Distilling Co. v. Continental Distilling Co., 106 F. 2d 486.

"We therefore held that a Court of Equity has no power or jurisdiction to determine or assess damages for a 'taking' of plaintiffs' property and is consequently

without jurisdiction to grant that phase of the alternative relief demanded by the plaintiffs."

While the members of this Court differed on several questions there involved, all of the Court were unanimously of the opinion that a Court of Equity could not award compensation for a "taking".

It is clear from the present pleadings that plaintiffs have been damaged, and the questions are: who must pay for this damage, what action or actions can be brought by plaintiffs, and who are proper parties therein? The answer to these questions will depend, in the last analysis, upon the facts developed at the trial of the case. For example, the nature and extent of the trespasses; the amount of interference with plaintiffs' lives or properties; whether frequent and dangerous and unlawful flights will amount to trespasses or by their nature, character and frequency, are so permanent as to amount to a "taking"; [fol. 69] and if a "taking", whether it be a "taking" of an easement or a fee simple—all of these questions will, in the last analysis, we repeat, depend upon the facts which are produced at the trial at law.

We are aware of the fact that the Airlines have pleaded, and the County has admitted, by its preliminary objections to the new matter contained in the Airlines' answer, that the County, ". . . under its right of eminent domain, has appropriated for public use, avigation easements for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. . . . Allegheny County has entered into a lease with each of the airline defendants granting to them for certain [valuable] considerations the right of ingress and egress to and from the said airport . . . [and] it is necessary that airplanes enter and leave the airport by passing through the air space above the plaintiffs' property below 500 feet."

Everyone knows that it is necessary for planes *in landings and takeoffs* to pass through the air space below 500 feet. The Airlines and the County have admitted for the first time that airplanes pass through the air space above

the plaintiffs' properties below 500 feet in takeoffs and landings.

The parties agree that private airlines have no right of eminent domain. The County of Allegheny, pursuant to statutory authority, has appropriated for public use, under its power of eminent domain, avigation easements for the flight of planes and has constructed, operated and leased this airport. Under the present pleadings, the [fol. 70] County of Allegheny is liable in eminent domain proceedings for damages to plaintiffs' properties—plaintiffs have the choice to bring an action of trespass, or proceedings for a "taking" against the County of Allegheny for their damages, depending upon the facts provable by plaintiffs.

We decide that the Court of Equity does not have jurisdiction under the pleadings in this case *to determine* that there was a "taking" of plaintiffs' properties, or the amount of damages resulting from a "taking" of the easement, or of the fee of the plaintiffs, as the case may be.

The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed "to determine and assess the damages for the land, property or material taken, injured or destroyed . . . ." See also: Article I, § 10; Article XVI, § 8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit, and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the Board of Viewers be bound by such a decision or could the Board make a determination that there was a "taking" of a fee simple instead of an easement, or that there was no "taking" at all? As the present Chief Justice said in *Powell Appeal*, 385 Pa. 467,* 123 A. 2d 650 (page

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*Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was *no specific* authority granted to the Court of Quarter Sessions or to the board of view *to determine* whether there had been a "taking".

[fol. 71] 471-472): "While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of damages or assessment of benefits: see Case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191. . . . '[The viewers] were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the sessions.'" **

It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the Airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the present defendants have been brought and completed, or have been waived under § 2632 of the Second Class County Code and finally determined in such a proceeding. This stay of proceedings shall be without prejudice to the right of each party to subsequently file, if desired, answers, replications and other pertinent pleadings.

The Orders of the Court of Common Pleas of Allegheny County dated January 2, 1958, at October Term, 1953, Nos. 1289, 1640, 1288, 1706 and 1707 are hereby reversed, and proceedings are hereby stayed in accordance with this Opinion. Each party shall bear his, its and their respective costs in this appeal.

[fol. 72]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

[Title omitted]

OPINION SUR PETITION FOR REHEARING—July 10, 1958

Before: Goodrich, McLaughlin and Staley, Circuit Judges.

Counsel for Allegheny County have based their petition for rehearing largely on a decision by the Supreme Court of Pennsylvania on June 3, 1958, in the case of *Gardner* v. *County of Allegheny*. The Court has examined that decision with great care and is unanimously of the conclusion that it does not control or even assist in the decision of this case. The petition for rehearing is, therefore, denied.

By The Court, Goodrich, Circuit Judge.

[fol. 73] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

[Title omitted]

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

ORDER DENYING REHEARING—July 10, 1958

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest: Harriet G. Humphrys, Chief Deputy Clerk.

[fol. 75] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 76]

SUPREME COURT OF THE UNITED STATES

No. 347—October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 157. Each case is allotted a total of one hour and a half for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.